No. 12703

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACKING COMPANY,

Appellant,

vs.

CARIBOO LAND & CATTLE CO., LTD.,

Appellee.

BRIEF OF APPELLANT UNION PACKING COMPANY.

BENJAMIN W. SHIPMAN,
511 Pacific Mutual Building, Los Angeles 14,
Attorney for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF APPELLANT UNION PACKING COMPANY.

Introductory Statement.

Appellant (defendant in the Court below) appeals from the judgment in the amount of approximately $14,000.00 rendered against it in a diverse citizenship action by appellee, a Canadian corporation.

The case was tried before the Honorable James M. Carter, a jury having been waived. The suit was for accounting by reason of defendant's alleged failure to pay for 248 head of cattle of a value of more than $50.000.00. No written contract was asserted, but plaintiff showed freight and customs expenditures, and the Trial Judge held that a case of promissory estoppel was made, taking the case out of the statute. At the trial it was admitted that appellant had refused to accept delivery from plain-

tiff, but had purchased the cattle later from a commission company on the open market.

There was a direct conflict in the evidence between plaintiff's own witnesses with respect to the asserted oral contract—so much so that the Trial Court stated on this issue:

> "This is probably the *closest* case that I have had to decide since I have been on the bench." [R. 123.]

Plaintiff and appellant's officer had some conversations with respect to plaintiff's cattle on September 8th and 10th. The Trial Court concluded that while no contract was made at that time, appellant's officer made an offer which was "a continuing offer" and that this was probably accepted when plaintiff shipped the cattle 18 days later. [R. 102, 123.] Conclusions I and II [R. 19] are in accord with the foregoing statement of the Court, but contrary to Finding V [R. 9] which intimates that an agreement was made on September 8th, and Finding VI which indicates a confirmation of this agreement on September 10th [R. 9-10].

After a telephone conversation with appellant's officer on or about September 27, 1948, in which appellant's officer suggested that efforts be made to sell the cattle in Canada before sending them to Los Angeles, plaintiff attempted to make such sale at Williams Lake near the ranch. In fact, a sale was agreed upon to a Canadian buyer who later refused to carry out the contract. Again efforts were made to sell the cattle at Vancouver, B. C.,

and when these failed, they were shipped to Los Angeles consigned to appellant, who refused to accept. With the consent of plaintiff's officer, they were diverted to the Union Stockyards for sale and ultimately purchased by appellant from a commission merchant.

The complaint alleges that the cattle were delivered to appellant [Par. IV; R. 4], and asks for an accounting of the balance of the purchase price. Finding XVIII [R. 14] is that defendant *refused to accept* delivery of the cattle, and that by reason thereof "plaintiff necessarily permitted" appellant to divert the cattle [R. 15]. The conclusion of the Court [R. 20] is that appellant's "*refusal to accept* said cattle . . . constituted a breach of the contract . . ."

The Trial Court finds a refusal to accept delivery and a breach of contract by appellant, but, nevertheless, orders judgment for the full amount of the purchase price, *i. e.*, $70,357.22, less the amount received from the commission house, and is in reality a judgment of specific performance. There is no finding that the plaintiff was damaged in any sum whatsoever at any time.

The Trial Court refused to consider the defense of the statute of frauds and frankly stated that, if he found there was an oral agreement to purchase the cattle, he would hold the defendant bound on the principle of promissory estoppel. [R. 102, 120.] The Trial Court was so obsessed with the idea of promissory estoppel that he refused to consider any cases other than *Seymour v. Oelrichs,* 156 Cal. 782. When his attention was called to a decision by this

Court, opinion by Justice Stephens, in *Wood v. Moore,* 97 F. 2d 920, he refused to accept the principle of that decision, stating:

> "The Court: *With all due respect to my superior Judge Stephens, I do not think that that is the law. I think that goes too far.*"

Instead of considering the question of the statute of frauds further, the Trial Court merely stated:

> "If I am wrong on the law, *you have your remedy of appeal.* It is a lot easier to appeal on questions of law than it is on questions of fact. I have ruled against you on your view of the law; therefore, it is an easier kind of an appeal to take." [R. 128.]

Appellant's contentions on appeal are:

I. There was no proof of any oral contract between plaintiff and appellant.

II. The oral contract asserted was within the statute of frauds and there was no proof of any facts which would take this case out of the operation of the statute.

III. The Findings do not support the judgment.

BRIEF OF THE ARGUMENT.

I.

There Was No Proof of Any Oral Contract Between Plaintiff and Appellant.

No enforceable contract was shown for the reason that the contract terms are so indefinite and uncertain that it is impossible to ascertain what promise was being made and what promise was being accepted.

McClintock v. Robinson, 18 Cal. App. 2d 577, 582;

Restatement, Contracts, Sec. 19;

California Civil Code, Sec. 1580;

12 *Am. Jur.,* p. 518, Sec. 21;

National Bank v. Hall, 101 U. S. 43, 44-5, 49-50;

Meux v. Hogue, 91 Cal. 442, 448.

It is essential in a case coming within the purview of the statute of frauds that the evidence of the asserted oral agreement be clear and unequivocal.

Hambey v. Wise, 181 Cal. 286, 289;

Blum v. Robertson, 24 Cal. 127, 143;

23 *Cal. Jur.* 466.

II.

The Oral Contract Asserted Was Within the Statute of Frauds and There Was No Proof of Any Facts Which Would Take This Case Out of the Operation of the Statute.

The Uniform Sales Act was adopted in California in 1931.

Civil Code, Secs. 1721, 1800.

The uniform law provisions relating to the statute of frauds appear in Civil Code, Section 1724, and Code of Civil Procedure, Section 1973(a).

Uniformity of interpretation and application is a primary necessity of the decisions under the uniform laws.

Charles Nelson Co. v. Morton, 106 Cal. App. 144, 149;

Utah State National Bank v. Smith, 180 Cal. 1, 3, 4;

C. I. T. Corporation v. Panac, 25 Cal. 2d 547, 552.

The stability and certainty of the rules of commercial law

> ". . . are of more importance than any fancied benefits which might accrue from any innovation upon the system."
>
> *Aud v. Magruder,* 10 Cal. 282, 291-2.

Under the rule of *Seymour v. Oelrichs,* 156 Cal. 782, it is necessary to an estoppel that there must be an irreparable change of position upon the part of plaintiff,

independent of mere part performance of the contract (pp. 793-4).

What acts of part performance of an oral contract are sufficient is specified by statute. Plaintiff does not claim sufficient part performance.

Paul v. Layne & Bowler Corp., 9 Cal. 2d 561, 565;

Kibbey v. Kenney (Ariz.), 218 Pac. 984-5 (decision by Justice Ross).

Under the decisions of this Court and the rule of the California cases there is no estoppel to take an oral contract out of the statute of frauds unless there has been conduct on the part of the opposite party amounting to a representation that he will not avail himself of the statute to escape his agreement.

E. K. Wood Lumber Co. v. Moore Mill & Lumber Co. (C. C. A. 9), 97 F. 2d 402, 409;

Georgia Peanut Co. v. Famo Products Co. (C. C. A. 9), 96 F. 2d 440, 441 (Justice Denman);

Cincinnati Distributing Co. v. Sherwood & Sherwood Co. (C. C. A. 9), 270 Fed. 82;

Albany Peanut Co. v. Euclid Candy Co., 30 Cal. App. 2d 35, 38-9;

Kroger v. Bauer, 46 Cal. App. 2d 801, 804;

Starkey v. Galloway (Ind.), 84 N. E. 2d 731;

Federal Land Bank v. Matson (S. D.), 5 N. W. 2d 314, 315;

Ludlow Cooperative Elevator Co. v. Burkland (Ill.), 87 N. E. 2d 238, 240-241.

III.

The Findings Do Not Support the Judgment.

The Court finds a refusal by defendant to accept the cattle. [R. 15, 20.] The only relief to which plaintiff would be entitled is damages for such breach, but the Findings and Record are bare of any suggestion of the amount of damages.

The judgment is rather one of specific performance which the Court had no right to order.

Again the finding that an oral contract to purchase the cattle was made on September 8th [Finding V; R. 9] confirmed on September 10th [Finding VI; R. 9-10] is in direct and irreconcilable conflict with the findings of fact in Conclusions I and II, that the offer then made was a continuing offer which was accepted by shipment on September 29th. The findings do not support the conclusion of estoppel to assert the statute of frauds.

The conclusions drawn by the Court do not follow from the specific facts found and the findings made do not support the Court's actual judgment.

ARGUMENT.

I.

There Was No Proof of Any Oral Contract Between Plaintiff and Appellant.

A. The Evidence Was Insufficient to Show a Mutually Enforceable and Binding Contract, Even Aside From the Statute of Frauds.

At the conclusion of the evidence the Trial Court stated that because of the disputed facts with reference to the asserted oral contract,

> "This is probably the *closest* case that I have had to decide since I have been on this bench." [R. 123.]

At the hearing on the motion for nonsuit he said that from the standpoint of plaintiff's strongest position,

> "You have Mr. Miller making an offer. It is a *continuing offer* until it is revoked."

He said the shipping of the cattle "would probably constitute an acceptance." [R. 102-3.]

This same idea is reflected in the Conclusion of Law I that appellant orally offered to purchase certain cattle and Conclusion II that plaintiff accepted the offer by shipping the cattle on September 29th [R. 19], but this Conclusion is in conflict with the statement in Findings V and VI that an agreement was made for the purchase of the cattle on September 8, 1948, and confirmed on September 10th [R. 9-10].

With this patent conflict in the Findings, it is difficult to determine the actual basis of the Court's decision, but under the cases and the state of the Record neither of the conflicting Findings can be sustained.

B. The Finding That There Was an Agreement on September 8 and September 10, 1948 [R. 9-10] Is Unsupported.

Mr. Miller denied that the discussions of this date covered anything other than general market conditions. [R. 81, 114.]

Mr. Wade, an officer of the plaintiff and who was the only other party to the conversations, stated as to the conversation of September 8th:

> "Q. Will you kindly relate that conversation with Mr. Miller?
>
> Mr. Shipman: If the conversation has to do with the making of an alleged contract, may it please the court, simply for the purpose of the record may I enter the objection that it is irrelevant, immaterial and incompetent as it appears from the statements made before your Honor that it is a transaction in excess of the statutory provisions.
>
> Mr. Mahl: I assure your Honor that this conversation has to do with the contract.
>
> The Court: Objection overruled.
>
> The Witness: I told Mr. Miller that Mr. Swanson had phoned me from the ranch and wanted to know if he was still interested in the purchase of the cattle that we discussed bringing down to him in May, and he said he was, and I asked him what the market was in Los Angeles and he said, 'I will pay you 46 cents per pound plus 2 cents for the offal, and grade from commercial up.'" [R. 25-26.]

With reference to the conversation on September 10th, the same witness stated:

> "Q. Will you tell us what was said at that conversation? What was that conversation?

A. I told Mr. Miller that my associate, Mr. Jaffe, was going up to the ranch and that I wanted to call him and confirm the conversation I had had with him on September 8th, and I had made a memorandum pad of our conversation at that September 8th meeting, so I referred to that. So I said, 'Well, Adolph, let me understand you clearly. If we ship cattle to you here in Los Angeles you will pay us 46 cents plus 2 cents for the offal and this is a firm commitment?'

He said, 'Yes, I can use this type of cattle. I will take them.'

I said, 'Well, the reason I am calling you back is I want to be sure that I have this commitment before I authorize the shipment of this cattle to Los Angeles.'

And he said, 'That is all right, son. Send them on down.'

He said, 'How many will there be?'

I said, 'Approximately 250 are ready to go now in this particular shipment, about 10 cars.'

He said, 'Well, that will be fine. You tell Swanson to send them on down.' " [R. 27-28.]

It is significant that the foregoing conversation on its face does not support the agreement to deliver in *October*. It is an agreement for immediate delivery, if at all. Certainly there is no evidence of any agreement which either party could enforce four or five weeks later in a fluctuating market.

The testimony of plaintiff's witness, Mr. Swanson, as to the phone conversation of September 27th, was:

"Q. Now will you tell us what the conversation was between you and Mr. Miller, as nearly as you can recall, Mr. Swanson? A. It is rather hard to recall

the entire conversation, but I called Adolph and, if I recall the conversation, I tried to sell the cattle there in Williams Lake—

Q. We will get to that in a moment.

The Court: What did you say over the telephone?

Q. (By Mr. Mahl): We are confining ourselves to this conversation on the phone. A. Well, as I recall it, I asked about the market in Los Angeles and, if I recall my statement, I said to Adolph, 'Well, is it all right to ship the cattle to the Union Packing Company?' He said, 'Well, the market is awfully weak down here, but try to sell them there if you can. If not, ship them.' Or words to that effect. I don't recall." [R. 61.]

While Jaffe, an officer of plaintiff, was in the telephone booth during the conversation and "could perhaps hear part of it" [R. 74] and had testified that appellant's officer said something about having a "deal" [R. 49], Mr. Swanson testified:

"The Court: Are you talking about the phone conversation now?

The Witness: As I recall that conversation—this is my recollection—I asked him about the market and then I naturally supposed that this is a deal which Wade and he had made, and I asked him, 'Well,' I said, 'is it all right to ship the cattle down to you?' I believe that is the way I put it. I am not certain about just what the wording was.

The Court: What else did he say?

The Witness: And he said to me, 'He said the market is bad down here, try to sell them up there if you can.'

The Court: Do you remember him saying anything about he had a deal?

The Witness: No, we didn't discuss that on the telephone.

The Court: Did he say, 'Send them on'?

The Witness: As I recall, he said, 'If you can't sell them why send them on.'

Q. (By Mr. Shipman): Did he say that he would use them? A. Well, I just—

Q. Did he say that to you? A. No, I don't think so.

Q. You had no other discussion as to the price? A. No." [R. 75.]

It is admitted that plaintiff did proceed with its efforts to sell the cattle to buyers other than appellant, first, trying to sell the cattle at Williams Lake near plaintiff's ranch [R. 72, 111] and then in Vancouver, B. C., when the cattle were already in Vancouver [R. 73, 112].

It is also admitted that Swanson, after having shipped the cattle from British Columbia, sent a wire to appellant [Plaintiff's Exhibit 1] stating that the cattle were being shipped to him and that plaintiff's officer was flying down to Los Angeles to see appellant. When appellant's officer received this wire, he made an effort to locate Swanson at British Columbia [R. 83, 114, 116], and when Swanson arrived the next day, he was told by appellant that the cattle would not be accepted and that appellant had not agreed to buy them [R. 64-65, 70, 73, 76]. Arrangements were made, with the consent of Swanson, to divert the cattle to the Union Stockyards and have them sold through the Southwest Commission Company. [R. 68-69, 76, 77.]

Appellant's officer's testimony with respect to the diversion is in the Record at pages 87 and 110, and the testi-

mony of Mr. Hill of the Southwest Commission Company at pages 105, 113 and 117.

Plaintiff made no objection to the diversion of the cattle but cooperated with the Southwest Commission Company in the sale of the cattle and accepted from the Southwest Commission Company a check in the amount of approximately $57,000.00.

The commission house was unable to obtain a bid higher than 21 cents, which was from the Cudahy Packing Company, and appellant, in order to help Swanson out, then made an offer of 21½ cents and purchased the cattle from the Southwest Commission Company. [R. 67, 69, 77, 86.]

The Trial Court, after stating that he was unable to resolve the conflicting testimony, referred to two matters which he considered significant as indicating reasons why appellant changed its mind about purchasing the cattle. The first [R. 124] was cancellation of a government contract for 200,000 pounds of meat (Canadian cattle were not applicable to supply a government contract). The second matter referred to by the Court [R. 125] is the drop in the price of cattle in early October.

In referring to these extraneous matters, the Court has violated the elemental rule that lack of evidence cannot be supplied by proof of motive.

As stated in *Percival v. National Drama Corporation,* 181 Cal. 631, 638:

> "Proof of motive cannot take the place of substantive proof of the act which is to be accomplished."

It is clear aside from the conflicting Findings and Conclusions of the Trial Court that the testimony of plaintiff does not support the finding of a definite certain contract.

There was no agreement which appellant at any time could have enforced against the plaintiff. Equally, there was no agreement which plaintiff could enforce against appellant.

The time of delivery of the cattle was not specified. In the conversations of September 8th and 10th Mr. Miller was said to have requested that the cattle be shipped immediately. This was not done. In the only other conversation, *i. e.,* September 27th, it is admitted that he suggested that efforts be made to sell the cattle in Canada and it is also admitted that such efforts were actually made.

Therefore, there was no binding contract on September 10th and no binding contract on September 27th, and none is found.

C. No Enforcible Contract Exists for the Reason That Its Terms Are so Indefinite and Uncertain That It Is Impossible to Ascertain What Promise Was Being Made and What Promise Was Being Accepted.

"'A contract is an agreement to do or not to do a certain thing.' (Sec. 1549, Civ. Code.) One of the essential elements of a contract is the consent of the parties. (Sec. 1550, Civ. Code.) This consent must be mutual. (Sec. 1565, Civ. Code.) 'Consent is not mutual, unless the parties all *agree upon the same thing in the same sense.* . . .' (Sec. 1580, Civ. Code.) (See, also, Restatement of the Law, Contracts, sec. 19.) As is said in 6 California Jurisprudence, page 41:

"'Mutual consent is necessary to the existence of any contract. Assent of at least two minds to each

and all of the essentials of the agreement is required; and it is only upon evidence of such assent that the law enforces the terms of a contract or gives a remedy for a breach of it. One cannot be made to stand on a contract to which he never consented.' "

McClintock v. Robinson, 18 Cal. App. 2d 577, 582.

12 *American Jurisprudence,* page 518, Section 21:

"Where Language is Ambiguous.—When the offerer, using ambiguous language, reasonably means one thing and the offeree reasonably understands differently, there is no contract. It has been stated that the parties in such a case have 'said different things.' Thus, where, after the parties have apparently agreed to the terms of a contract, circumstances disclose a latent ambiguity in the meaning of an essential word by which one of the parties meant one thing and the other a different thing, the difference going to the essence of the supposed contract, the result is that there is no contract. Where there is such a misunderstanding as to the terms of a contract, neither party is obligated in law or in equity. Furthermore, a defense may be asserted where there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus *ad idem.*"

As the Supreme Court has stated:

"Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or in equity. Baldwin v. Middleberger, 2 Hall (N. Y.)

176; Coles v. Bowne, 10 Paige (N. Y.) 526; Utley v. Donaldson, 94 U. S. 29.

"Where a contract is a unit, and left uncertain in one particular, *the whole will be regarded as only inchoate, because the parties have not been ad idem, and, therefore, neither is bound.* Appleby v. Johnson, Law Rep. 9 C. P. 158." (Emphasis added.)

National Bank v. Hall, 101 U. S. 43, 44-5.

Quoted with approval:

Meux v. Hogue, 91 Cal. 442, 448.

See, also, to the same effect:

Breckenridge v. Crocker, 78 Cal. 529, 536-8;

Harvey v. Duffey, 99 Cal. 401, 405;

Gruesner v. Thatcher (Minn.), 197 N. W. 968, 969;

Sibley v. Felton (Mass.), 31 N. E. 10;

German Savings & Loan Soc. v. McLellan, 154 Cal. 710, 715-6;

Peerless Glass Co. v. Pacific Crockery and Tinware Co., 121 Cal. 641, 646-7;

Indiana Fuel Supply Co. v. Indianapolis Basket Co. (Ind. App.), 84 N. W. 776, 777;

Gordon v. Churchill (S. D.), 148 N. W. 848-850;

D. S. Cage & Co. v. Black (Ark.), 134 S. W. 942-945;

Georgia R. R. Co. v. Smith (Ga.), 10 S. E. 235-236.

Tested by the rule of the foregoing cases, it is clear that there is no binding oral contract in the present case.

In the present case the degree of proof required of a party asserting an oral contract is greater than that laid down in the cases mentioned above where there was no question of the statute of frauds. Where a party seeks to avoid the operation of the statute of frauds, the cases hold that his evidence of the oral agreement must be clear and convincing and not conflicting and unclear as the Trial Court declared plaintiff's evidence to be in this case. [R. 123.]

The cases hold that plaintiff's evidence of the oral agreement in order to avoid the bar of the statute of frauds must be "just as good as a writing of the agreement between the parties."

Hambey v. Wise, 181 Cal. 286, 289.

". . . the agreement must appear to be certain in its terms, and just and fair in all its parts."

Blum v. Robertson, 24 Cal. 127, 143;

23 *Cal. Jur.* 466.

In the present case under no permissible view of the evidence can it be said that the contract is clear, certain, free from doubt and mutually binding, but whatever the decision of the Court on that point it is settled beyond controversy that the statute of frauds bars recovery under such an asserted contract.

II.

The Oral Contract Asserted Was Within the Statute of Frauds and There Was No Proof of Any Facts Which Would Take This Case Out of the Operation of the Statute.

The asserted contract is barred by the statute of frauds.

Civil Code, Sec. 1724.

The interpretation and application of Civil Code, Section 1724, which makes unenforceable an oral contract for the sale of personal property of the value of more than $500.00, is a question arising under the Uniform Sales Act which was adopted in California in 1931 and involves a matter in which uniformity of interpreation is essential to the commercial life of the nation.

As the California courts have stated:

> "It is very much more important to have uniform rules than inerrant logic . . . Uniform laws must necessarily fail of their purpose unless there is uniformity in their interpretation and application."
>
> *Charles Nelson Co. v. Morton,* 106 Cal. App. 144, 149.

> "We think that principles of commercial law, long established and maintained by a consistent course of decisions in the other states, should not be disturbed. . . . We repeat, the stability and certainty of those rules are of more importance than any fancied benefits which might accrue from any innovation upon the system."
>
> *Aud v. Magruder,* 10 Cal. 282, 291-2;
>
> *Utah State National Bank v. Smith,* 180 Cal. 1, 3, 4;
>
> *C. I. T. Corp. v. Panac,* 25 Cal. 2d 547, 552.

It is obvious in the present case that the Trial Court was more actuated by zeal to give effect to his theory of promissory estoppel than by any consideration of the many authorities bearing on the case, including the decision of this Circuit which he expressly refused to follow. [R. 122.]

The Trial Court's holding was that if there was an oral agreement, then promissory estoppel applied. Its only question was: Is there an oral agreement? [R. 120.]

He specifically stated that the rule of this Court in *Wood v. Moore,* 97 F. 2d 420, that "to give rise to the estoppel there must have been conduct on the part of the opposite party amounting to a representation that he will not avail himself of the statute to escape his agreement" would *not* be followed by him, saying:

> "With all due respect to my superior, Judge Stephens, *I do not think that that is the law.* I think that goes too far." [R. 122.]

In that case, the full title of which is *E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (C. C. A. 9), 97 F. 2d 402, 409, plaintiff sued for damages for breach of contract to purchase lumber. Judgment for defendant was affirmed, this Court saying:

> "The defense of the statute of frauds having been raised by appellee's answer which denied the making of the contract, the burden was on appellant to prove that the contract sought to be enforced was in writing. Walsh v. Standart, 174 Cal. 807, 810, 164 P. 795; Feeney v. Howard, 79 Cal. 525, 21 P. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Videau v. Griffin, 21 Cal. 389, 391; Jamison v. Hyde, 141 Cal. 109, 112, 74 P. 695." (P. 408.)

"Appellant argues that appellee is estopped to assert that the agent had no written authority. We see no reason for applying a different rule in respect to this contention than that applicable where estoppel is claimed with respect to the statute of frauds proper. In the latter case it is necessary to show not only a change of position to the injury of the party asserting the estoppel, but also that there has been conduct on the part of the opposite party amounting to a representation that he will not avail himself of the statute to escape his agreement. In Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154, the case most strongly relied upon by appellant, there was a definite promise to give a written contract, which promise was never performed. The court in holding that there was an estoppel to assert the statute quoted from 5 Brown on Statute of Frauds, §457a, as follows: 'A plaintiff . . . must be able to show clearly . . . not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance. . . .' (Page 795, 106 P. page 94.)" (P. 409.)

This decision written by Justice Stephens bears a close similarity to the decision of this Court (opinion by Justice Denman) in *Georgia Peanut Co. v. Famo Products Co.* (C. C. A. 9), 96 F. 2d 440, 441, where plaintiff sued for breach of a contract of sale of peanuts to defendant's predecessors, claiming the contract was made by a broker by virtue of a memorandum signed by the broker for both parties. Defendants denied the contract and denied the broker's authority. There was no written memorandum

signed by the principal. In affirming judgment for defendants, this Court said:

> "Appellant attempted to establish that the buyer was estopped. The evidence offered in support of appellant's burden of proof on this issue was that the buyer said and did nothing about the memorandum prior to the time the appellant bought certain peanuts to resell to the buyer. Since there is no binding contract, the buyer can be estopped to deny its validity only by some prejudice to the seller caused by some affirmative act on which the seller relied. We uphold the District Court's finding that there was no such action on the part of the buyer." (Pp. 441-2.)

In *Cincinnati Distributing Co. v. Sherwood & Sherwood Co.* (C. C. A. 9), 270 Fed. 82, plaintiff sued to recover damages for defendant's breach of contract to sell it 198 barrels of whiskey at a certain price. The contract had been made with defendant's agent who had sent plaintiff certain confirmatory telegrams. But the telegrams did not show any agency and there was no written authorization for the agent to represent defendants. Judgment for defendants was affirmed, this Court saying:

> "It was shown that the plaintiff, immediately upon receiving notice of the purchase by Hellman, sold the merchandise to a customer at $1.40 per gallon, and about two weeks after that time received notice that the defendant had repudiated the contract and sold the whisky to another. It was shown, also, that the plaintiff, being unable to deliver the merchandise it had sold, was obliged to buy other whisky at $1.85 per gallon in order to fulfill its obligation, whereby it lost $5,272.75. The plaintiff contends that the facts estop the defendant to avail itself of the statute of frauds; that one is not permitted to dispute a state of facts

which he has induced another to believe in and to act upon. It is true that a contract may be within the statute of frauds, yet if the conduct of the party who relies upon the statute has been such as to raise an equity outside of and independent of the contract, he may be estopped to make that defense. 20 Cyc. 308.

"In Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418, the court held that to create estoppel against the defense of the statute there must be some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the other party, either express or implied. Here there were no acts of acquiescence on the part of the defendant. It received no consideration for the sale. It partes with the possession of none of the goods purchased. It was not advised that the goods were wanted for immediate resale, nor did it know before it repudiated the contract that the goods had been resold. There was nothing except its silence to indicate to the plaintiff that the oral contract would be performed. The mere fact that one acts upon an oral promise, hoping that it will be carried out, does not create estoppel. Miller v. Hart, 122 Ky. 494, 91 S. W. 698; Regan v. Kirk, 140 Iowa 302, 118 N. W. 317." (Pp. 83-4.)

It is obvious that under the rule of these three decisions written by learned Justices of this Court, plaintiff has shown nothing to avoid the bar of the statute of frauds. It is equally obvious that the rule of these decisions is in no wise inconsistent with the rule of the California State Court decisions.

In *Seymour v. Oelrichs,* 156 Cal. 782, 793, it was the fact of defendant's promise to execute a written contract and the subsequent failure to do so that gave rise to the estoppel. (*Ruinello v. Murray,* 99 A. C. A. 20, 22, 221 P. 2d 184.)

Under the rule of *Seymour v. Oelrichs,* it is necessary to an estoppel that there must be an irreparable change of position upon the part of plaintiff, independent of mere part performance of the contract.

> "The claim of plaintiff is not that mere part performance of a contract for personal services which by its terms is not to be performed within a year, 'invalid' under our statute because not evidenced by writing, renders the same valid and enforceable. Such a claim would, of course, find no support in the authorities. (5 Brown on Statute of Frauds, Sec. 558.) . . . under this claim the fact of part performance by plaintiff plays no part whatever."
>
> *Seymour v. Oelrichs,* 156 Cal. 782, 793-4.

In *Paul v. Layne & Bowler Corp.* 9 Cal. 2d 561, 565, plaintiff sued for (1) damages for failure to execute a farm lease and for (2) amounts expended to improve the farm. Judgment for defendant was affirmed as to the first cause of action and reversed as to the second. The Court said:

> "Nor may the plaintiff place reliance upon the equitable doctrine of estoppel recognized in Seymour v. Oelrichs, 156 Cal. 782 (106 Pac. 88, 134 Am. St. Rep. 154), and similar cases (see Long v. Long, 162 Cal. 427 (122 Pac. 1077); Little v. Union Oil Co., 73 Cal. App. 612, 620 (238 Pac. 1066), to support his contention that he is entitled to damages for the breach

of the oral agreement to execute the lease, which, so he claims, was fully performed by him. It is apparently the plaintiff's theory that the performance alleged is the consideration for the promise to make the lease, and that having performed on his part he is entitled to damages for the failure of the defendant to perform. But the passing of the consideration as performance on his part of the oral contract is not alone sufficient to entitle him to any relief for the breach thereof. His remedy is in a cause of action for the return of the benefits received by the defendant. (Forrester v. Flores, 64 Cal. 24 (38 Pac. 107); Davis v. Judson, 159 Cal. 121 (113 Pac. 147); Matheron v. Ramina Corp., 49 Cal. App. 690, 694 (194 Pac. 86); Dondero v. Aparicio, 63 Cal. App. 373 (218 Pac. 608).) The facts alleged and stated show that the plaintiff could not present a case of fraud or unconscionable injury to support an estoppel under any statute or authority relied upon by him.

"The intimation in the case of Martinez v. Yancy, 40 Cal. App. 503 (180 Pac. 945), relied on by the plaintiff, that there may be a remedy by an action for damages for the breach of an oral promise to make a lease for a longer period than one year, is inconsistent with the generally accepted doctrine that no right of action for damages exists for the breach of an invalid or unenforceable contract (Kiser v. Richardson, 91 Kan. 812 (139 Pac. 373), and cases cited in note, Ann. Cas. 1915D, p. 540 *et seq.*), even though the plaintiff has partly or wholly performed on his part (White v. McKnight, 146 S. C. 59 (143 S. E. 552), and cases cited in note, 59 A. L. R. 1305 *et seq.*), and should be disregarded.

"Under any view of the case, the most to which the plaintiff would be entitled is the amount he had

expended for the defendant's account for which he has not been reimbursed, and a return of or compensation for the benefits which the defendant has received under the plaintiff's occupancy by which the defendant has become unjustly enriched and for which it is therefore indebted to the plaintiff." (Pp. 565-6.)

In *Albany Peanut Co. v. Euclid Candy Co.,* 30 Cal. App. 2d 35, 38-9, plaintiff sued for damages for breach of an oral contract to buy peanuts. Plaintiff alleged it held the peanuts for defendant from June 3rd to September 19th, that defendant promised to put the contract in writing but finally returned it unsigned, and that plaintiff had suffered substantial damages by reason of holding the peanuts. Judgment for plaintiff was reversed, the Court saying at pages 38-39:

"Before such an estoppel can arise the essential terms of the contract must be shown with reasonable certainty, and that representations were made by the opposite party that the invalidity of the contract under the statute would not be asserted, together with the fact that the party urging the estoppel has, pursuant to the terms of the contract, and induced by the representations and in reliance thereupon, changed his position to his detriment, the intention to make such change being known at the time to the one making the representations. The circumstances must clearly indicate that it would be a fraud for the party offering the inducements to assert the invalidity of the contract under the statute, and unless the words and conduct of the party sought to be held amount to an

inducement to the other to waive a written contract in reliance upon the representation that the person promising will not avail himself of the statute of frauds there is an absence of fraud which is requisite to an estoppel. (Little v. Union Oil Co., 73 Cal. App. 612 (238 Pac. 1066); Long v. Long, 162 Cal. 427 (122 Pac. 1077); Seymour v. Oelrichs, 156 Cal. 782 (106 Pac. 88, 134 Am. St. Rep. 154); Zellner v. Wassman, 184 Cal. 80 (193 Pac. 84); Standing v. Morosco, 43 Cal. App. 244 (184 Pac. 954).)

"A mere promise to execute a written contract, followed by refusal to do so, is not sufficient to create an estoppel, even though reliance is placed on such promise and damage is occasioned by such refusal. The acts and conduct of the promisor must so clearly indicate that he does not intend to avail himself of the statute that to permit him to do so would be to work a fraud upon the other party. (Little v. Union Oil Co., *supra.*)" (Pp. 38-9.)

The foregoing statement of the rule was quoted and applied in *Kroger v. Bauer,* 46 Cal. App. 2d 801, 804.

What acts of part performance of an oral contract are sufficient is specified by statute.

In *Kibbey v. Kinney* (Ariz.), 218 Pac. 984-5, decision by Justice Ross, it was stated:

"But the statute provides just what acts or things will take a parol contract out of the statute, and what plaintiff claims he did is not one of them." (The

decision then sets forth the rule of *27 C. J.* 346, Sec. 428.)

"Accordingly the doctrine of part performance has no application to the sale of goods."

In *Starkey v. Galloway* (Ind.), 84 N. E. 2d 731, after orally selling 45 steers to plaintiff, defendant resold in Chicago for a higher price. Plaintiff sued for conversion. Judgment for defendant was affirmed, the Court saying:

". . . one who seeks to assert an equitable estoppel must affirmatively show that he has relied upon the conduct of the other party and has acted upon it in such a manner as to change his position for the worse; that the other party's refusal to carry out the terms of the agreement has resulted not merely in a denial of the rights which the agreement was to confer, but the infliction of an unjust and unconscionable injury and loss. 49 Am. Jur., p. 890, Sec. 583 . . ."

Federal Land Bank v. Matson (S. D.), 5 N. W. 2d 314, 315;

Ludlow Coop. Elevator Co. v. Burkland (Ill.), 87 N. E. 2d 238, 240-41.

A state court decision is not binding, except as to that portion of the decision necessary to determination of rights of parties. *Dicta* or other chance expressions are to be disregarded.

New England Mut. Life Ins. Co. v. Mitchell (C. C. A. 4), 118 F. 2d 414, 419, 420; cert. denied 86 L. Ed. 505.

In *Booth v. A. Levy & J. Zentner Co.*, 21 Cal. App. 427, 431, it was held, reversing a judgment for plaintiff, that payment of freight charges by seller and resale at a loss is insufficient to take an oral contract out of the statute, the Court saying:

> "We see nothing in the record to support the contention that defendant is estopped to rely upon the statute of frauds. It is a plain case where the seller chose to ship goods to a distant buyer who was bound by an oral agreement only. To hold that under such circumstances the buyer who refuses to accept the goods is estopped to rely upon the statute would be to practically abrogate the statute of frauds. (Hicks v. Post, 154 Cal. 22 (96 Pac. 878).)" (P. 431.)

Here the freight and custom duty paid were necessary to be paid on shipment to any large American market. There is no finding whatsoever, and there can be no presumption, that plaintiff was damaged by the amount of these payments, or any other amount.

That plaintiff suffered any damage by payment of freight and customs is wholly conjectural. Plaintiff had tried to sell the cattle in Canada unsuccessfully. Plaintiff's officer testified that its natural markets with the lifting of the embargo were in the United States, mentioning markets all over the country. [R. 35.]

While there was some evidence of a decline in cattle prices in Los Angeles, it cannot be presumed that this decline was purely local, but, on the other hand, it must be

presumed to be national, and, being national, it would have also affected the Canadian markets.

To make the sale to any American market, plaintiff would have had to incur the expense which it did incur. In making this expense it did not suffer an irreparable hardship. It was a natural and necessary expense of marketing the cattle and just as much a part of normal expense as feeding the cattle.

Even in the case of *Seymour v. Oelrichs,* 156 Cal. 782, as pointed out above, it is held that part performance of a contract itself is not a hardship within the meaning of the rule of promissory estoppel. Certainly there was no damage suffered by plaintiff under the rule of the *Seymour v. Oelrichs* case, or of the *Booth v. A. Levy & J. Zentner* case, or *Standing v. Morosco,* 43 Cal. App. 244, where the decision of the Trial Court was by Justice Wilbur and the decision on appeal by Justice James.

To ignore the defense of the statute of frauds in this case as the Trial Court has done is to render the act entirely nugatory. All that a seller has to do to avoid the statute is to ship goods to a purchaser and then "outswear" him at the trial, the very situation which the act was intended to preclude.

The Record, therefore, shows none of the elements essential to be shown to avoid the statute, but, on the contrary, shows affirmatively that no judicial consideration was given to these issues.

III.

The Findings Do Not Support the Judgment.

While the Trial Court in five separate Findings declares there was a "refusal" by appellant "to accept" the cattle [Finding XVII, R. 13-14; Finding XVIII, R. 14; Finding XXIV, R. 17; Finding XXV, R. 17; Conclusion III, R. 20], the relief ordered by the Court is not damages for such breach, but specific performance [R. 17-18].

The judgment [R. 21] and the Findings [R. 17] are merely a decision that plaintiff is entitled to recover the full amount of money to which it would have been entitled under the asserted contract, *i. e.,* a judgment of specific performance. There is no finding anywhere that plaintiff was damaged in any sum of money or that plaintiff is entitled to recover any sum as damages, nor was there any evidence to support any such finding.

If plaintiff were entitled to damages, it would be the difference between the market value and the contract value at the date of appellant's refusal to accept delivery which is found to be October 6, 1948 [R. 14], but there was no evidence at the trial and no finding as to the difference between the contract and market price at that date, which alone would measure plaintiff's damages.

Civil Code, Sec. 1784.

There is nothing to show that the cattle had any special or unique value either in the Findings or the Record.

Even the findings as to the existence of the asserted oral contract are irreconcilable. It is first declared that the phone conversation of September 8th created an oral contract [Finding V; R. 9] and then that the phone conversation of September 10th confirmed this oral contract

[Finding VI; R. 9-10]. But the Trial Court concludes in an entirely different vein Conclusion I [R. 19] that appellant on September 8, 1948, and again on September 10th, did "orally offer to purchase" the cattle and by Conclusion II [R. 20] "Plaintiff accepted the said offer . . . by shipping 248 head of cattle from British Columbia, Canada, on September 29th, 1948, consigned to defendant at Los Angeles, California."

The same holding of a continuing offer instead of a contract was announced by the Trial Court at the conclusion of the trial. [R. 123.] It had previously been stated by the Court at R. 102.

Certainly an oral contract of such nebulous and indefinite character is insufficient to avoid the bar of the statute of frauds.

In an attempt to avoid the bar of the statute, the Trial Court found that plaintiff had expended certain sums for freight and duty [Finding XV; R. 13], but there is no finding that plaintiff suffered damage in this or any other amount. In fact, the presumption is to the contrary. On any shipment to the United States these charges would have had to be paid by plaintiff. The ultimate receipts presumably were increased by expenditures in sending the cattle to any large market.

It follows that there is no basis for the theory of promissory estoppel espoused by the Trial Court in defiance of the decisions of this Court and no support for his Conclusion III [R. 19-20] in that regard.

The Trial Court was required to make findings of fact on all material issues necessary to support the judgment. (Rule 52.)

In *Sims v. Green* (C. C. A. 3), 161 F. 2d 87, 89, judgment for plaintiff was reversed, the Court saying:

> "The findings of fact are insufficient. Finding 17 will not sustain the preliminary injunction and Sims can point to no stronger finding."

In *Schilling v. Schwitzer-Cummins Co.* (C. C. A., D. C.), 142 F. 2d 82, 84, the Court said:

> "The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence."

Under the new rules the inferences or conclusions drawn by the Trial Court from its findings of fact operate without benefit of presumption.

In *Kuhn v. Princess Lida* (C. C. A. 3), 119 F. 2d 704, 705-6, the Court said after referring to the Rule 52 and the extent to which findings of fact are binding on appeal:

> "The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, the appellate court remains free to draw the ultimate inferences and conclusions which in its opinion, the findings reasonably induce."

In *Gates v. General Casualty Co.* (C. C. A. 9), 120 F. 2d 925, 929, this Court said that the power of review under Rule 52a is broader than the power possessed by the California Appellate Courts.

From a consideration of the findings, conclusions and opinion of the Trial Court itself, it is obvious that a fair

trial was not afforded and that the Trial Court, in effect, endeavored to make a contract between the parties which the parties themselves had never entered into. This the Court did after it had realized that there was no contract between the parties.

Conclusion.

The decision of the Trial Court, in addition to being in wilful defiance of the decisions of this Court, as the Trial Judge himself stated, departs from the principle that the agreement must be certain in all of its terms and just and fair in all of its parts, in order to avoid the bar of the statute of frauds. The purported agreement here is but a roving commission for the plaintiff to obtain all he can wherever he can, and, in the event he couldn't get any more, then and only then he could dump the burden upon the shoulders of the defendant. Such is not our concept of any principle that would give the right to invoke what would in effect amount to equitable relief.

To sustain the present decision will be to annul the statute of frauds. The issues here presented are of vital concern to every business enterprise.

It is respectfully submitted that for each of the reasons herein advanced the judgment of the Trial Court should be reversed.

Respectfully submitted,

Benjamin W. Shipman,
Attorney for Appellant.